

Introduction

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Federalism considerations remain every bit as critical at each successive stage of growth within a federalist regime as they are at initial formation. Many policy issues attract interest at multiple levels of government, each of which is likely to have a different set of priorities at stake. Environmental and natural resources law provides both an excellent example of this phenomenon, and also its own microcosm of federalism generally, given the wide array of approaches utilized throughout the field. If we want a testing ground for the various tenets of federalism theory, we find no better battlefield than that of environmental and natural resources policy, which represents the front line of federalism controversy. Powerful federal interests in environmental quality and human health face stark opposition by entrenched local expectations regarding land-use control and property rights. As Erin Ryan notes in the concluding chapter of this book, environmental law is “the canary in federalism’s coal mine.”

The goal of this book is to bring together the variety of approaches to environmental federalism and consider what is working and what is not working, what might be translated into another environmental field to improve it, and what works best in just the field in which it presently exists. Each contributor has focused on a different environmental statute or regime, both directly analyzing the relevant statutes or other sources of law and contemplating the possibilities with an eye towards evolution via implementation. We have, collectively, taken a comparative approach, and summed up with a concluding chapter comparing the various methods and considering what one area might draw from another.

This theme – examining existing regimes and determining both how successful they are in practice as well as how context-dependent that evaluation is – stems from the hope of bringing value from experiences in one environmental area into our policy choices in another. With such a variety of approaches in use, there is quite a bit of experiential data to work with. Further, because the authors are seasoned environmental federalism scholars, they bring their own ideas and theories to the table. This collective effort to offer a broad overview of the field (including

helpful descriptive portions for improved accessibility to students) and then draw potential policy exchanges from that work, is unprecedented and sure to contribute great value to our understanding of environmental federalism as well as to our policy-making future.

The contributors represent legal academia in five different countries and their law schools number around a score. Many are already leaders in this field; others are well on their way. They have one thing in common: an interest in the manner in which regulatory power is divided among the federal government, states and local governments, and a desire to improve on how that division is structured wherever possible.

Part I of this Introduction will briefly introduce the concept and history of federalism generally. This will be followed by the environmental federalism basics in Part II. In both parts I shall refrain from delving too deeply into the complexities or relevant theories, as this is the task of the substantive chapters of this volume, and has been expertly accomplished within them. After laying this basic foundation for the book, Part III will preview the chapters to follow.

I WHAT IS FEDERALISM?

In the United States, as indicated by the country's name, we have separately governed states that are united into one country. This is a federalist structure, and was designed with the goals of avoiding a tyrannical national government, promoting more accessible government and public participation, and encouraging policy innovation at the state level. In his Federalist Paper #10, James Madison noted the importance of each level of government serving as a check on the other.

Federalism is a system wherein the same territory is governed by more than one government, each at a different scale. The US Constitution grants certain powers to the federal government, typically in ways that have been interpreted as broad categories, such as regulating matters that impact interstate commerce. Powers that do not fit into any of these categories are reserved to the states in the Tenth Amendment. States can create local governments, which in turn have the power to tax and legislate, so these functions take place at all levels. Because there are so many governing bodies in one country, representing different scales, different geographic locations and, consequently, different constituent interests, we must determine who will govern what. In light of the myriad policy issues in need of regulation this is no easy question, and is the focus of most federalism scholarship.

II FEDERALISM IN THE CONTEXT OF ENVIRONMENTAL AND NATURAL RESOURCES LAW

There is traditionally an effort in federalism to match the scale of governance to the scale at which the interest lies, such as establishing currency at the national level and regulating land use at the local level. This logic is weakened, however, in the environmental context, where there are such intense interests at every level, interests that may be at odds with each other. Although there are a handful of older environmental statutes, most of which did very little to actually advance environmental improvement, environmental law in the US was largely born in the early 1970s with a burst of legislation covering enormous ground in just a few years. This is where the key innovation took place to address the problem of multilevel interests: carefully structured cooperative federalism. In two of the numerous new environmental statutes from this time – the Clean Air Act and the Clean Water Act – Congress gave states the power to create their own implementation programs while giving the EPA the responsibility of defining expectations and overseeing the state implementation. There were also some aspects, those that were more nationally uniform or that addressed interstate impacts, left to federal implementation directly. This careful division of power into a cooperative system has been very successful for this area of law, and is evolving into even more complex multiscale approaches.

III THE ORGANIZATION OF THIS BOOK

The book is divided into six parts. In the first part, we look at the carefully designed cooperative federalism schemes created in three major federal environmental statutes. Two of these statutes were pioneers of federalism innovation, but time has highlighted their weaknesses. We then turn to federalism issues relating to US regulation of natural resources in the second part of the book. In the third part we consider the need to address the threat of climate change, both in terms of mitigation of greenhouse gas emissions and the policy choices that will become necessary in the context of adapting to the changing climate. The fourth part provides us with some intriguing theoretical insights, which consider more complex divisions of power than traditional dualism theory has. Part V adds several non-US regimes to the discussion, drawing insights from India and Australia, as well as the European Union from Germany's

point of view. In the final part Professor Erin Ryan considers all that preceded and draws some overarching concluding thoughts on environmental federalism.

A. Major United States Environmental Statutes

A great deal of federalism pioneering has taken place in the context of US federal environmental statutes, through which Congress carefully laid out its plan for shared federal and state involvement in pollution control implementation and policy-making. Chapter 1 takes us right to the beginning of this story, as Robert Glicksman and Jessica Wentz explore the foundations of the cooperative federalism approach to environmental law, first developed in the Clean Air Act. They find ample evidence of Congressional intent to address collective action problems via this new approach. They also find that this effort led to some successful experiences in practice, in spite of the many failures that accompany them, and consider whether these experiences suggest realistic potential for addressing climate change via the Clean Air Act.

The next major US statute implementing a cooperative federalism model was the Clean Water Act, which closely followed on the heels of the Clean Air Act, but with a somewhat different model. In Chapter 2, William Andreen provides the structure of the Act and its dynamic federalism methodology, which he finds to be rather successful in achieving marked reductions in water pollution. Unfortunately, notes Andreen, the approach in the Clean Water Act is inadequately comprehensive, failing to address either run-off pollution (that which is not released into the waters via a point source) or in-stream flows. Run-off pollution has thus become the greatest remaining source of pollutants in US waters, and those concerned with protecting the water levels that aquatic ecosystems require have been forced to resort to other inadequate sources of protection, with water levels ultimately not well preserved. The dual federalism model, which had long failed when applied to water quality overall, was left in place in these two areas, even while proactively replacing it in the context of point source pollution. The clean water chain is thus broken at its weakest link and cannot achieve its goals without sealing this gap. Andreen proposes increased federal authority over these areas in order to ameliorate this problem.

Finally, the materials on federal environmental statutes conclude in Chapter 3 with a move into the realm of post-hoc liability for environmental harms, specifically those resulting from land disposal of hazardous waste. Alexandra Klass and Emma Fazio review the reach of the liability scheme in the Comprehensive Environmental Response,

Compensation, and Liability Act (CERCLA), which provides remedies for hazardous waste clean-up expenses but falls short of compensating for other related damages resulting from the contamination. The latter is traditionally included in state common law claims, and the authors opine that these should remain intact, at least to the extent they do not conflict with CERCLA. They similarly address several other areas of potential preemption, reaching the same conclusion, and suggesting that in ambiguous cases weight should be given to CERCLA's remedial purpose.

B. Regulation of Natural Resources

Although the US regulates the protection and exploitation of natural resources somewhat pervasively as well, this area lacks the structure and clarity of environmental regulation (pollution control). Indeed, natural resources law and policy approaches are extremely varied and rarely comprehensive even within a given area. In Chapter 4, Blake Hudson discusses an area of natural resource regulation that serves as a perfect example of this disjointedness: forests. He notes that only 35 percent of forest land is federally owned and regulated, while the other 65 percent is subject to widely varying and unpredictable state regulation (or no regulation at all). Unlike regimes addressing resources such as air, water, biodiversity, fisheries, wetlands and hazardous waste – regardless of whether they happen to be on federally owned land – the federal government has little to no involvement in managing this other 65 percent of critically needed and rapidly dwindling forests. This leads to wide variation in policies at a time when we are on a path toward even more widespread deforestation. Hudson advocates for a more holistic approach to forest management, while acknowledging the challenges to increasing federal control.

Although federal regulation of endangered species protection, via the Endangered Species Act, is far more comprehensive, it may go too far in the other direction. Rather than leaving too much to the states, it takes on so much at the federal level that we have never, in over four decades, managed to implement it. Kalyani Robbins takes on this problem in Chapter 5, noting that federal oversight is key to avoiding the collective action problems of state governance, but arguing that we could achieve greater implementation success by tapping into state and local expertise and implementation potential that is presently going to waste. The ESA leans so heavily on its implementing federal agencies that state action, even conservation efforts, can sometimes be hamstrung. This will become increasingly true as climate change brings the need for increasingly proactive species management and renders static preserves less helpful.

Robbins finds that endangered species law could benefit from a more cooperative federalism approach, and suggests informal ways of achieving this, in light of the improbability of Congress designing an entirely new ESA.

The “Regulation of Natural Resources” part concludes in Chapter 6, in which Hannah Wiseman explains the importance of shared authority over energy development and suggests approaches for ensuring that all governments and stakeholders have a role in energy governance. Wiseman observes that there are key interests at stake at all levels – federal, state and local – and describes how the concentration of power at the state level tends to shut out some of these interests in a detrimental manner. To address this problem she recommends inclusive and coordinated governance for energy development.

C. Climate Change and Federalism

The US has yet to enact legislation to address comprehensively the need to mitigate the emission of greenhouse gases that lead to global climate disruption, but such legislation is expected. In its absence, some states have been regulating in the area, resulting in the need to determine the extent to which eventual federal legislation should preempt state efforts. Some scholars have argued that it should preempt the field and replace all state governance of climate mitigation, but in Chapter 7 William Buzbee provides good reason to reconsider this position. While acknowledging that a single administrator is ideal for a comprehensive market-based (credit trading) system, Buzbee notes that leaving state laws in place would provide a better safety net in the event that federal policy choices change or there is implementation failure. It also enables us to keep the value of innovation at the state level that may result in positive policy change at the federal level. Finally, overlapping jurisdiction can provide valuable gap-filling and result in even greater mitigation benefits than we otherwise might observe.

Kirsten Engel, in Chapter 8, takes us through the logical next step, considering how much state innovation is really happening. States have for decades been filling the gap left by the federal government’s failure to enact climate change legislation, which is generally viewed as policy innovation. This has surprised some, as it contradicted their expectations that states would free-ride off other states’ innovations, thus minimizing innovation overall. However, Engel suggests that what we have observed is not (usually) so much policy innovation as it is “scale innovation,” as most of these state policies were already in use at the national level elsewhere. This is still valuable, she explains. Given the overarching

necessity of cutting back on greenhouse gas emissions, policy adoption on multiple scales is arguably of greater social value than developing new and original policy tools. This is also in line with Buzbee's proposal in Chapter 7.

No section on climate change would be complete without turning to adaptation. The IPCC has made very clear in its recent reports that it is too late for mitigation alone, we will need to both mitigate greenhouse gases to slow the progression of climate change and also adapt to the climate change that has already been irreversibly set in motion. Given that this could mean mass migrations and changes in land use and infrastructure needs, it naturally raises substantial questions about federalism. In Chapter 9 Alice Kaswan reviews the array of regulatory areas raised by the various climate adaptation requirements and suggests the need for more cooperative multiscale governance in many of these areas, including those traditionally kept local, such as land use and water policy.

D. Theories of Diffuse Regulatory Power

Preemption of one regulatory program by another, more supreme, program is an important federalism topic. Typically, the question is like that discussed in Chapter 3 – the extent to which a federal law preempts state law. Does it preempt the entire field and wipe out state law entirely, or does it allow states to govern the same behavior more strictly with statutes that go further than the federal statute? The latter is more common, in which state regulation remains in effect with the sole exception of conflicts with the federal law. Ann Carlson has noticed a somewhat unusual circumstance, however, which she calls “reverse preemption,” as she explains in Chapter 10. Using the context of water law, she points out two scenarios in which states can actually veto federal regulatory implementation. For example, the Coastal Zone Management Act enables a state with a federally approved Coastal Zone Management Plan to veto federal actions it deems inconsistent with its plan, such as offshore oil drilling leases. Carlson also identifies a similar provision in the Clean Water Act. Her analysis of these provisions leads to the conclusion that they allow Congress to utilize states (especially those with strong environmental values) to keep the federal administration in check, thus furthering separation of powers values.

In Chapter 11, Keith Hirokawa and Jonathan Rosenbloom take a stance against excessive preemption. They explore whether imposed homogeneity or sameness at the federal level defeats the benefits of self-identifying communities through land use controls at the local level. They

argue that federal environmental regulation and widespread state preemption of local environmental governance detaches a community from its local ecosystem. As such, preemption can in some instances drown the potential for greater levels of regulation in those communities that would do so.

E. Comparing International Regimes

The international chapters are especially diverse, and best contribute to the comparative law flavor of the book. First, in Chapter 12, Robert Fowler takes us through the recent turmoil in Australia, which has significantly impacted its federalism structure. Although Australian constitutional law gave the Commonwealth (federal government) broad power to regulate environmental issues, the Commonwealth has in practice followed a system of substantial cooperation with the states. It avoided preempting or duplicating what was being accomplished on the state level, but maintained its power, governed in the area, and retained oversight. The recently elected Abbott Coalition government is pushing this tradition further in the direction of state sovereignty and threatens to take environmental governance out of national control. While the ultimate resolution of these issues remains to be seen at the time of writing, Fowler provides a solid foundation for understanding the issues as they evolve.

From Australia we travel to the European Union, where countries must work within an extra level of government. In Chapter 13, Nathalie Behnke and Annegret Eppler provide the German approach to existing within that larger regime, which has been relatively successful. The authors analyze the complex policy-making network of actors, institutions and processes in a system with more levels to coordinate than is typical. They find that the Europeanization of environmental policy led to relevant changes and adaptations in the institutional structure within Germany. As a result, and in spite of numerous potential veto points and opportunities for deadlock due to the need for interaction among all levels of government, environmental decision-making in the German system is actually functioning quite well.

Our final destination in this non-US section is India, where Sairam Bhat takes us in Chapter 14. Bhat describes the significant tension between state and local autonomy on the one hand and federal control on the other. In spite of substantial pressures toward decentralization, the uniformity gained from federal control over environmental matters is holding strong, especially since the Bhopal industrial tragedy triggered greater support for federal environmental protections. In the end, this

tension has developed into a cooperative federalism approach to environmental regulation in India.

F. Concluding Thoughts

In the final chapter of the book, Erin Ryan takes on the enormous task of pulling together all the chapters that precede hers, reviewing the issues relating to environmental federalism holistically, and providing her analysis and conclusions. Drawing from her own extensive body of work in federalism generally, including her book on the subject, she observes that there are certain differences with environmental law and related constituent interests that merit it a special case in the federalism discussion. Because the interests are so strong at all levels, the need to determine the right balance of power is as high as it gets. It is also an area that in practice has served as a testing ground for federalism innovation. For these and other reasons, Ryan gives environmental federalism the title of federalism's "canary in the coal mine." Ultimately, she views the approaches to environmental federalism as valuable federalism innovation to be considered for other fields. Environmental federalism brings us further in the direction of multiscalar and cooperative methods of governance, and this is a good thing.

